STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN CHARLES YEAGER,

Defendant-Appellant.

UNPUBLISHED
September 28, 1999

No. 211016
Cass Circuit Court
LC No. 96-008927 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2) (victim at least thirteen years of age, position of authority), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c; MSA 28.788(3) (victim at least thirteen years of age, position of authority). The trial court sentenced defendant to concurrent terms of eight to twenty years' imprisonment on the CSC I conviction and two to fifteen years' imprisonment on the CSC II conviction. Defendant appeals as of right. We affirm.

I

Defendant first claims that he was denied the effective assistance of counsel on numerous grounds. Defendant did not advance his claim of ineffective assistance of counsel before the trial court; thus, this Court will consider the claim only to the extent that claimed mistakes of counsel are apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To justify reversal on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's

competence with the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

A

Defendant alleges that counsel failed to investigate and present evidence indicating the victim had made false accusations of criminal sexual conduct against others. The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). In this case, there is no evidence that there was any substance to the prosecution's information that defendant would call a witness to testify regarding false accusations of sexual abuse by the victim. It is not apparent from the record that defendant would have been able to produce such a witness or that the witness' testimony would have constituted a substantial defense. Thus, defendant has not shown that he was prejudiced by counsel's failure to pursue this evidence.

B

Defendant next contends that counsel's failure to object to numerous instances of hearsay evidence constitutes ineffective assistance. In particular, defendant contends that counsel was ineffective for his failure to object when the victim's mother testified regarding statements the victim made during her disclosure of the alleged assault. First, we note that counsel objected to other testimony of the victim's mother on the ground that it was hearsay; thus, defendant has not shown that counsel's failure to object to this particular testimony was not a matter of trial strategy.

Regardless, even assuming that counsel's performance was deficient for his failure to object, we find it unlikely that this hearsay evidence resulted in prejudice to defendant such that he was denied a fair trial. Sexual abuse cases involving younger children may be distinguished from those involving older children with regard to error in the admission of hearsay statements because the defense has full opportunity to cross-examine older children. *People v Smith*, 456 Mich 543, 555 n 5; 581 NW2d 654 (1998). Further, the inquiry into prejudice must focus on the nature of the error and assess its effect in light of the weight and strength of the untainted evidence. *Id*. at 555.

In this case, the victim testified before her mother, and in greater detail, that defendant kissed her, unbuttoned and unzipped her shorts, and digitally penetrated her. Although the mother's quotes were more expressive and emotional, the victim likewise testified that she went upstairs to the bathroom twice to pray that defendant would stop and that she would have the power to tell him to stop. The victim, who was fifteen years old at the time of trial, was subject to full cross-examination. Moreover, the mother's testimony was only a small part of the testimony throughout the three days of trial.

C

Defendant also contends that repeated prosecution references to God and religion were improper and bolstered the victim's credibility. "No witness may be questioned in relation to his opinions on religion, either before or after he is sworn." MCL 600.1436; MSA 27A.1436. The purpose of the statutory prohibition on religious questioning is to avoid the possibility that jurors will be prejudiced against a particular witness on the basis of a juror's disagreement with the witness' religious views. *People v Jones*, 82 Mich App 510, 516; 267 NW2d 433 (1978). The statute does not prohibit all questions regarding religion, but rather those which extend into prejudicial areas concerning a witness's beliefs or specific practices. *Id*. at 515. See also *People v Calloway (On Remand)*, 180 Mich App 295, 298; 446 NW2d 870 (1989) (questions on religion were not in reference to religious opinions and were part of a relevant inquiry regarding the witness' activities at the time of the killing).

In this case, defendant's role as a pastor, and the victim's faith, were central to the issue of whether defendant used his authority to coerce the victim into sexual acts, an element of the offenses charged. Defendant and the victim were questioned about various matters which related to religion. This questioning was, to a great extent, unavoidable because the key events in this case centered around Bible school and other church activities, and particularly because the questioning was relevant to the issue of whether defendant was in a position of authority and used his authority to coerce the victim into the sexual acts. Therefore, the questioning was not error requiring reversal, and counsel was not ineffective for failing to object to the questioning.

D

Defendant contends that counsel was ineffective for failing to object to leading questions in direct examination of the victim. We find this claim without merit.

The examples cited by defendant were a small part of the victim's testimony. Defendant has not shown that the evidence would not otherwise have been elicited, absent the alleged leading questions. Further, counsel's failure to object to the prosecutor's manner of questioning the victim may have been trial strategy in that the witness was a teenager, an alleged victim, and counsel's objection to minor leading questions may have been damaging to the defense by portraying the defense as bullying the victim. The record reflects that defense counsel did object at various other points throughout the trial, and repeatedly objected to the direct examination of the victim's mother. Thus, defendant has not shown that counsel's failure to object to the leading questions was not a matter of trial strategy.

E

Next, defendant alleges several instances of prosecutorial misconduct and contends that counsel was ineffective for failing to object to this misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

1

Defendant claims that defense counsel failed to object to inflammatory collateral matters brought up by the prosecution, e.g., whether defendant had pornographic movies in his home, and whether he believed masturbation was a good thing. The prosecution's questions regarding the pornographic tape and masturbation were not improper. "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980). Questions of prosecutorial misconduct are decided on a case by case basis and the court must evaluate each question within the context of the particular facts of the case. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997).

In this case, the evidence of the pornographic video was relevant to the victim's disclosure of the sexual assault. The victim testified that she could not watch the tape the day after the assault because it reminded her of what had happened; she subsequently revealed the assault to defendant's daughter, which led to the victim's promise that she would not tell anyone about the assault. A prosecutor need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

With regard to the questions about masturbation, this topic arose because during the police investigation defendant apparently suggested this as a possible explanation of the victim's behavior. Further, defendant testified on direct examination that he overheard a conversation in which the victim talked about masturbating boys, and that he ended the discussion because of his beliefs about premarital sex. On cross-examination, the prosecutor probed defendant's views on this issue. This questioning was not improper given the context. Further, defendant has not shown that counsel's failure to object to the challenged questioning was not trial strategy to portray defendant as open and candid, of good moral character, and as having nothing to hide.

2

Next, defendant claims that counsel was ineffective for his failure to object to the prosecutor's repeated requests that witnesses comment on other witnesses' testimony, e.g., whether another witness was lying and whether the victim's testimony at trial was consistent with her earlier testimony.

The prosecutor's questioning in this case was improper, but it is not error requiring reversal. Where the prosecutor asks a defendant to comment on the truthfulness of prosecution witnesses, the questions are improper but do not require reversal absent unfair prejudice which could not have been cured by a limiting instruction. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985); *People v Messenger*, 221 Mich App 171, 180 & n 4; 561 NW2d 463 (1997).

In this case, while the prosecutor's apparent strategy was to have defendant label the witnesses "liars," defendant responded to the questions capably; it cannot be said that he was harmed by the exchanges. See *Buckey*, *supra* at 17 (for this same conclusion). Moreover, because defendant

seemed to respond easily to these questions, it may well have been defense counsel's strategy to allow the prosecutor to continue this line of questioning, anticipating that it would be to defendant's benefit. Thus, defendant's claim of ineffective assistance is also without merit as he has not shown that counsel's failure to object was not based on trial strategy.

Defendant includes in his contention that it was improper for the prosecutor to ask a witness whether the victim's testimony was consistent with her earlier testimony and statements. However, defendant cites no other authority for this contention. "A party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987).

Defendant claims that the prosecution improperly bolstered the victim's testimony by asking her whether she was lying and whether others thought she was lying. It is unlikely that defendant suffered prejudice in this regard; thus, even if the questions were improper, it is not error requiring reversal. See *Buckey*, *supra* at 17. The victim's testimony as to her own veracity would hardly bolster her credibility, as it would be expected that she would deny fabricating her testimony even if she had. With regard to the questions of whether others thought she was lying, the victim testified that they did, quoting friends who accused her of lying; this testimony likewise can hardly be viewed as improper bolstering of the victim's credibility. Because defendant has not shown prejudice, his ineffective assistance claim on this issue is without merit.

3

Defendant claims that the prosecutor improperly shifted the burden of proof by references to defendant's lack of responsive action after he learned of the victim's accusations, i.e., defendant took no steps to contact the police and failed to return the victim's telephone call. Defendant cites *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973), to support his contention; however, we note that *Bobo* is not controlling in cases where a defendant's "'silence' occurred before any police contact." *People v Lawton,* 196 Mich App 341, 353; 492 NW2d 810 (1992).

In this case, the prosecutor's remarks responded to defendant's statements on direct examination of his reaction to the victim's accusations and his response to a phone call from the victim. In general, a defendant is subject to cross-examination as is any other witness; his testimony may be assailed and his credibility impeached. MRE 611(b); *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995); *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). The questioning did not improperly shift the burden of proof. Moreover, it is unlikely that defendant was prejudiced; the judge properly instructed the jury regarding the prosecutor's burden of proof:

> Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence *or to do anything*. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty. [Emphasis added.]

F

Defendant next claims that counsel was ineffective for failing to object to the prosecution's expert witness' qualifications and testimony. Defendant contends that counsel should have objected to the expert's qualification because the expert stated that she worked with six to seven thousand child sexual assault victims per year, since 1975. This claim is without merit. The prosecutor asked the expert how many victims she had worked with in her "career," not per "year," and the expert responded accordingly. Whether counsel should have challenged the witness' statement to lessen the impact of her later testimony is a matter of conjecture. This Court will not assess counsel's competence with the benefit of hindsight. We cannot conclude that counsel was ineffective in this regard.

Defendant also claims that counsel was ineffective for failing to object to the expert's substantive testimony. An expert in childhood sexual abuse may (1) "testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim," and (2) "testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857, amended 450 Mich 1212 (1995). See also *People v Lukity*, ___ Mich ___; 596 NW2d 607 (Docket No. 110737, issued 7/13/99) (reiterating these principles). We conclude that, for the most part, the expert testimony was allowable under *Peterson*, *supra* at 352-353, to rebut the attack on the victim's credibility and to explain behavior that may confuse a jury. *Id*. at 362 & n 7. The expert's testimony regarding the victim's delay in disclosure, and the manner of disclosure was admissible. See *id*. at 374 n 13. Further, most of the remaining testimony was admissible because it responded to defense argument. *Id*. at 373-375.

However, to the extent that the prosecutor questioned the expert whether certain factual situations or behaviors made a report of an assault less "believable" or make a victim's story "unbelievable," we find that the questioning elicited impermissible expert testimony. Such testimony, in effect, was an expert's opinion that the victim was being truthful, which is impermissible under *Peterson*, *supra* at 369. It improperly vouched for the veracity of the child. *Lukity*, *supra*, slip op at 19; *Peterson*, *supra* at 352, 375-376. Nevertheless, the inadmissible testimony was a relatively small portion of the expert testimony and defendant called his own expert witness to testify, effectively contradicting the prosecution's expert testimony. Any error in admitting the evidence was harmless. MCL 769.26; MSA 28.1096; *Lukity*, *supra*, slip op at 21; *Peterson*, *supra* at 377-379. Thus, defendant was not denied a fair trial; therefore, his claim of ineffective assistance must fail.

G

Defendant also contends that defense counsel was ineffective for his total failure to object. Because defendant's allegations of prosecutorial misconduct are without basis, counsel was not ineffective for failing to object in this regard. Further, the record reflects that counsel made numerous objections to other testimony. This claim is without merit.

II

Defendant's next claim of appeal is that there was insufficient evidence that defendant was in a position of authority. Defendant was convicted of one count of CSC I under MCL 750.520b(1)(b)(iii); MSA 28.788(2)(1)(b)(iii), which provides:

> A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> (b) That other person is at least 13 but less than 16 years of age and any of the following:
>
> * * *
>
> (iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

In this case, defendant was also convicted of one count of CSC II, MCL 750.520c; MSA 28.788(3), which contains essentially the same position of authority element contained in MCL 750.520b(1)(b)(iii); MSA 28.788(2)(1)(b)(iii).

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998); *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992); *Warren*, *supra* at 343.

The position of authority element requires proof that (1) the defendant was in a position of authority over the victim, and (2) the defendant used this authority to coerce the victim to submit to the sexual acts. *Reid, supra*, at 467. This Court considers various factors in determining whether a defendant was in a position of authority over a victim. *Id*. at 467-468.

A

In this case, a rational jury could conclude that defendant was in a position of authority over the victim. Defendant was a pastor, psychologist, and counselor, and he talked to the victim about religion. Although he was not specifically the victim's pastor, she attended defendant's church functions with him; thus, she was exposed to defendant's role as a pastor. Defendant agreed that his role as a pastor and his professional work involve influencing people and impacting their lives, and that his work depends on whether he establishes a trust relationship with the people involved. The victim testified that she respected defendant because he was a trustworthy person and "somebody you could talk to." Both the victim and defendant testified that the victim was like a member of defendant's family.

On the night in question, the victim, a thirteen-year-old, was visiting defendant's home, where he was the adult in charge. Defendant testified that he asserted his authority over the victim as the adult in charge when he curtailed the discussion of masturbation, and then he lectured the victim and his daughter about premarital sex, and "how vulnerable young girls are to teenage pregnancy." The victim testified that she respected defendant's authority and would comply with defendant's instructions when in his home. The victim's mother testified that she gave her permission for the victim to go to defendant's home because she trusted defendant and felt that it would be a comfortable, safe environment. This evidence, viewed in a light most favorable to the prosecution, is sufficient for a rational trier of fact to determine beyond a reasonable doubt that defendant was in a position of authority over the victim at the time of the alleged sexual acts.

B

With regard to the second requirement in the position of authority element, i.e., the defendant used this authority to coerce the victim to submit to the sexual acts, we find this requirement is also met. In *Reid, supra* at 472, this Court noted that a "position of practical authority" over the victim was sufficient to establish coercion. The *Reid* panel noted that a common feature of situations of coercion is that the victims are in a position of special vulnerability to the defendants. *Id*. There is sufficient evidence of coercion where a reasonable jury could find that the defendant "exploited the special vulnerability attendant to his relationship with the complainant" to abuse the complainant sexually. *Id*.

This Court's analysis in *Reid, supra*, supports a finding that the evidence in this case was sufficient to show that defendant used his position of authority to coerce the victim into acquiescing to the sexual acts. The victim's mother entrusted her to the care of defendant in that he was the adult in charge. The victim felt constrained to follow his instructions when she was in defendant's home. Moreover, defendant was a pastor and a psychologist who asserted his role in both regards in the victim's presence at church functions and in personal lecturing. Defendant admittedly used his authority over the victim, as when he ended an alleged discussion of masturbation. Defendant testified that he was "real clear" to the girls in his lecture on the premarital sex subjects, because he felt "very deeply about that," and stated "usually when I talk they shut up." The victim was susceptible to his control as a young girl, particularly because she trusted defendant and she was like a member of defendant's family.

The victim testified that defendant told her to come downstairs, where he was alone. He told her to lie down beside him. He touched her breasts inside her bra. When defendant asked if it bothered the victim, she shook her head and mumbled "No." The victim testified that defendant later told the girls to sit next to him on the couch. Defendant covered the three of them with a blanket. The victim testified that while under the blanket, defendant unbuttoned and unzipped her shorts, and placed his finger into her vagina. Coercion need not be direct; it may be implied, legal or constructive, such that the victim is constrained by subjugation to do what his free will would refuse. *Id*. at 469, 471. A rational factfinder could find that the victim was constrained by subjugation, and, thus, coerced into submitting to the sexual acts of defendant.

III

Defendant's final claim is that the alleged prosecutorial misconduct undermined his right to a fair trial. This claim is without merit. Defense counsel failed to object to the alleged instances of prosecutorial misconduct at trial; therefore, this issue is not preserved. Issues of prosecutorial misconduct will not be reviewed absent objection unless a curative instruction could not have eliminated the prejudicial effect or unless the failure to consider the issue would result in a miscarriage of justice. *Howard*, *supra* at 544.

We addressed the alleged instances of prosecutorial misconduct under defendant's claim of ineffective assistance of counsel, *supra*. The prosecutor's conduct, for the most part, was not improper, and to the extent that any conduct was improper, defendant was not prejudiced. Therefore, there is no issue of misconduct warranting review. The only improper conduct was the prosecutor's questioning of defendant regarding the testimony of other witnesses. Defendant was not prejudiced in that he responded to these questions well. Moreover, any resulting prejudice could have been cured by instruction.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski